

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| COLLETTE DENISE CAIN, |) | |
| |) | No. CV-10-3099-CI |
| Plaintiff, |) | |
| |) | ORDER GRANTING PLAINTIFF'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | AND REMANDING THE MATTER TO |
| MICHAEL J. ASTRUE, Commissioner |) | THE COMMISSIONER FOR |
| of Social Security, |) | ADDITIONAL PROCEEDINGS |
| |) | |
| Defendant. |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 20, 30.) Attorney Thomas Bothwell represents Collette Cain (Plaintiff); Special Assistant United States Attorney Debra J. Meachum represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed for disability insurance benefits (DIB) on September 6, 2007, and for Supplemental Security Income (SSI) on September 14, 2007. (Tr. 9, 154.) She alleged disability due to depression, anxiety, congenital pancreatic divisum, and epilepsy, with an onset date of September 10, 2007. (Tr. 159.) Benefits were

1 denied initially and on reconsideration. Plaintiff timely requested
2 a hearing before an administrative law judge (ALJ), which was held
3 before ALJ Marie Palachuk on February 9, 2010. (Tr. 36-75.)
4 Plaintiff, who was represented by counsel, appeared and testified.
5 In addition, medical experts Donna M. Veraldi, Ph.D., and Arvin J.
6 Klein, M.D., and vocational expert Scott A. Whitmer testified. (Tr.
7 112-17.) The ALJ denied benefits on March 4, 2009, and the Appeals
8 Council denied review. (Tr. 1-5, 6-27.) The instant matter is
9 before this court pursuant to 42 U.S.C. § 405(g).

10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
12 court set out the standard of review:

13 A district court's order upholding the Commissioner's
14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
15 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
16 Commissioner may be reversed only if it is not supported
17 by substantial evidence or if it is based on legal error.
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
19 Substantial evidence is defined as being more than a mere
20 scintilla, but less than a preponderance. *Id.* at 1098.
21 Put another way, substantial evidence is such relevant
22 evidence as a reasonable mind might accept as adequate to
23 support a conclusion. *Richardson v. Perales*, 402 U.S.
24 389, 401 (1971). If the evidence is susceptible to more
25 than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner.
27 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
28 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

26 It is the role of the trier of fact, not this court, to resolve
27 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
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1 supports more than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner. *Tackett*, 180
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
4 Nevertheless, a decision supported by substantial evidence will
5 still be set aside if the proper legal standards were not applied in
6 weighing the evidence and making the decision. *Browner v. Secretary*
7 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
8 there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987).

13 SEQUENTIAL EVALUATION

14 The Commissioner has established a five-step sequential
15 evaluation process for determining whether a person is disabled. 20
16 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
17 137, 140-42 (1987). In steps one through four, the burden of proof
18 rests upon the claimant to establish a prima facie case of
19 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
20 920, 921 (9th Cir. 1971). This burden is met once a claimant
21 establishes that a physical or mental impairment prevents her from
22 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
23 416.920(a). If a claimant cannot do her past relevant work, the ALJ
24 proceeds to step five, and the burden shifts to the Commissioner to
25 show that (1) the claimant can make an adjustment to other work; and
26 (2) specific jobs exist in the national economy which claimant can
27 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*

1 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

2 **STATEMENT OF THE CASE**

3 At the time of the hearing, Plaintiff was 38 years old,
4 unmarried without children, and living with her mother. (Tr. 43.)
5 Plaintiff testified she had a high school diploma (GED), vocational
6 certification as an auto technician, and work experience as a
7 cashier, receptionist, auto mechanic, janitor, fryer person, and
8 veterinarian technician. (Tr. 57, 66, 425.) Plaintiff has a
9 history of health problems due to a congenital pancreatic defect and
10 a seizure disorder. (Tr. 59.) She testified she was last employed
11 in 2005, and she could no longer work due to abdominal pain, stress
12 induced diarrhea, and emotional issues, including panic attacks.
13 (Tr. 57-58, 64.)

14 **ADMINISTRATIVE DECISION**

15 The ALJ found Plaintiff met the insured status requirements for
16 DIB through September 30, 2007. At step one, she found Plaintiff
17 had not engaged in substantial gainful activity since the alleged
18 onset date of September 10, 2007. (Tr. 11.) At step two, she
19 found Plaintiff has severe impairments of major depressive disorder;
20 anxiety disorder; pain disorder; chronic pancreatitis; seizure
21 disorder; reactive airway disease; diabetes mellitus; hypertension;
22 left knee disorder; sinusitis; and right shoulder disorder. (*Id.*)
23 The following impairments found in the record are determined to be
24 non-severe, as defined by the Social Security Act: gastroesophageal
25 reflux disease; migraine headaches; edema of feet and ankles;
26 congestive heart failure; asthma; chronic hidradentitis suppurativa;
27 hyperlipidemia and intermittent leukocytosis; ear pain and otitis

1 media; possible attention deficit disorder, insomnia, left arm
2 numbness, and left foot pain. (Tr. 12-14.) At step three, the ALJ
3 found Plaintiff's impairments, alone and in combination, do not meet
4 or medically equal one of the listed impairments in 20 C.F.R.,
5 Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 14.) At
6 step four, the ALJ determined Plaintiff has the residual functional
7 capacity (RFC) to perform medium work, with postural limitations,
8 and needs to "avoid heavy machinery, unprotected heights, and
9 respiratory irritants." (Tr. 16.) In addition, Plaintiff is
10 restricted to superficial contact with coworkers and a low stress
11 environment, defined as "only occasional changes in the work
12 setting." (*Id.*)

13 In her step four findings, the ALJ summarized Plaintiff's
14 testimony, made credibility findings, and concluded Plaintiff's
15 subjective complaints regarding the severity of her functional
16 limitations were not credible to the extent they were inconsistent
17 with the RFC findings. (Tr. 16-19.) Considering VE testimony and
18 the record, the ALJ concluded Plaintiff could not perform her past
19 work. (Tr. 21.) Proceeding to step five, the ALJ found there is a
20 significant number of jobs in the national economy Plaintiff can
21 perform, such as credit card clerk, general clerk, and weight
22 tester. (Tr. 22.) She concluded Plaintiff was not disabled, as
23 defined by the Social Security Act, from September 10, 2007, through
24 the date of her final decision. (*Id.*)

25 ISSUES

26 The question is whether the ALJ's decision is supported by
27 substantial evidence and free of legal error. Specifically,
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1 Plaintiff argues the primary issue is whether the Commissioner met
2 his burden at step five to show there is a significant number of
3 jobs in the national economy that Plaintiff can perform in spite of
4 physical and mental limitations established by the record.
5 Plaintiff contends the ALJ erred when she rejected limitations
6 assessed by treating and examining medical providers; failed to
7 include in her step four and step five findings limitations
8 identified by the medical expert; and improperly rejected lay
9 witness testimony regarding her limitations. (ECF No. 21.)
10 Defendant responds the ALJ's denial of benefits is supported by
11 substantial evidence and should be affirmed. (ECF No. 31.)

12 DISCUSSION

13 A. Evaluation of Acceptable Medical Source Opinions at Step Four

14 At step four, it is the ALJ's responsibility to consider the
15 entire record, including acceptable medical source and other medical
16 source opinions,¹ observations by non-medical sources, and credible
17 allegations of the claimant, and determine what a claimant can do
18 despite her physical and/or mental limitations. 20 C.F.R.
19 § 404.1545(a)(1), 416.945(a)(1). The final RFC determination must
20 include all work-related limitations supported by the record and
21 "not depend[ent] on [Plaintiff's] subjective complaints." 20 C.F.R.
22 § 416.94; *Bayliss v Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005);

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24 ¹ Under the Commissioner's regulations, licensed physicians and
25 psychologists are considered "acceptable medical sources." Other
26 medical sources include mental health therapists, nurse
27 practitioners, and physician's assistants. 20 C.F.R. §§
28 404.1513(a),(d), 416.913(a),(d).

1 SSR 96-5p.

2 Plaintiff argues the ALJ (1) failed to incorporate accurately
3 the opinion of examining psychologist Jay Toews, Ed.D., that
4 Plaintiff needed a "low stress job environment," and (2) failed to
5 include unrejected, moderate cognitive and social functioning
6 limitations assessed by Donna Veraldi, Ph.D., and James Bailey,
7 Ph.D. (ECF No. 21 at 20; Tr. 19, 21-22.)

8 In these proceedings, the opinions of a treating acceptable
9 medical source carry more weight than those of an examining medical
10 source, and an examining medical source opinion carries more weight
11 than a non-examining medical source opinion. *Benecke v. Barnhart*,
12 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821,
13 830 (9th Cir. 1995). If the opinion of a treating or examining
14 medical source is contradicted, it can only be rejected for specific
15 and legitimate reasons that are supported by substantial evidence in
16 the record. *Andrews*, 53 F.3d at 1043. The opinions of non-
17 examining medical sources are not substantial evidence unless they
18 are supported by other unrejected medical evidence in the record.
19 *Andrews*, 53 F.3d at 1041.

20 Here, the record includes medical reports and assessments by
21 Plaintiff's treating physicians; Dr. Toews, Ed.D.; and agency
22 reviewing psychologist Dr. Bailey. In addition, the ALJ relied on
23 the testimony and non-examining opinions of the medical expert, Dr.
24 Veraldi, Ph.D., based on her review and interpretation of the entire
25 record. (Tr. 21.)

26 **1. Dr. Toews, Examining Psychologist**

27 Plaintiff was referred to Dr. Toews for a consultative
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1 examination in March 2008. He did not have medical records to
2 review and did not administer objective psychological tests. (Tr.
3 424-27.) He based his opinions on a mental status exam and
4 observations. As noted by the ALJ, Dr. Toews was not able to assess
5 severity of Plaintiff's symptoms "except by subjective report."²
6 (Tr. 20.) Dr. Toews diagnosed an adjustment disorder with anxiety
7 and depression (secondary to her medical problems), and a pain
8 disorder. (Tr. 20, 427.) Based on the mental status exam and
9 limited observation, he opined her "mood or affective problems"
10 would not preclude work, but her medical problems may affect her
11 persistence and she would need a "low stress work environment."
12 (Tr. 427.) The ALJ gave significant weight to Dr. Toews'
13 conclusions that Plaintiff's condition did not preclude work, and
14 her "cognitive abilities, memory, attention, and concentration were
15 intact." (Tr. 20.) Regarding Dr. Toews' recommended "low stress"
16 work environment, the ALJ defined this restriction in the RFC
17 findings, without explanation or reference to supporting evidence,
18 as "only occasional changes in the work setting," at steps four and
19 five. (Tr. 16, 69.) The ALJ did not reject Dr. Toews' opinion that

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21 ² Because Dr. Toews' opinions are based entirely on Plaintiff's
22 self-report, and the ALJ found Plaintiff's subjective complaints are
23 not entirely credible (Tr. 17), Dr. Toews' opinions are arguably
24 unsupported by substantial evidence. On remand, a new psychological
25 evaluation with objective testing and a review of medical records is
26 necessary to assess Plaintiff's credibility and provide objective
27 evidence upon which to base credibility findings and the final
28 psychological RFC. SSR 96-8p.

1 Plaintiff's persistence could be affected by medical problems and
2 attendant pain; therefore, the effects of pain decreased persistence
3 must be addressed in the RFC findings. SSR 96-8p (RFC entails
4 consideration of all impairments and resultant limitations that may
5 narrow range of work.)

6 **2. Dr. Veraldi and Dr. Bailey, Non-Examining Psychologists**

7 At the hearing, Dr. Veraldi discussed medical evidence in the
8 record, including agency non-examining RFC evaluations and treatment
9 records from the Farm Workers Clinic and Central Washington
10 Community Mental Health. (Tr. 41-44, 248-423, 428-35, 492-515, 572-
11 626.) She specifically opined Plaintiff did not meet a Listing,
12 but would have moderate limitations in: (1) her ability to
13 understand and remember detailed instruction "because she is often
14 preoccupied with her symptoms"; (2) her ability to maintain
15 attention and concentration for an extended period of time; (3) the
16 ability to complete a normal work day without interruptions from
17 psychologically based symptoms; and (4) the ability to interact with
18 the public. (Tr. 43-44.) The ALJ found Dr. Veraldi's opinions were
19 supported by the record and gave them "significant weight." (Tr.
20 21.)

21 Moderate limitations in Plaintiff's sustained concentration and
22 persistence, (ability to work with others without being distracted),
23 social functioning, and adaptation were also assessed by Dr. Bailey,
24 Ph.D., in April 2008. (Tr. 450-51.) The ALJ specifically gave Dr.
25 Bailey's findings "significant" weight because they were consistent
26 with other evidence in the record, including Dr. Toews' findings.
27 (Tr. 20.) Because these unrejected non-examining opinions are
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1 supported by Dr. Toews' opinions, the ALJ is required consider them
2 at steps four and five when Plaintiff's capacity to do basic work
3 tasks is determined. 20 C.F.R. §§ 404.1545, 416.945; Andrews, 53
4 F.3d at 1041 (non-examining opinions supported by other medical
5 evidence are considered substantial evidence).

6 **B. Other Medical Sources**

7 In addition to acceptable medical sources, the ALJ must
8 consider the opinions of other medical sources, such as nurse
9 practitioners, mental health therapists, and physician's assistants,
10 regarding how a claimant's impairments limit his or her ability to
11 work. 20 C.F.R. § 416.913(d); *Sprague*, 812 F.2d at 1232; SSR 06-
12 03p. Plaintiff argues the ALJ's blanket rejection of marked and
13 severe limitations assessed by her therapists was error.

14 In his policy ruling, the Commissioner has identified certain
15 factors that should be considered by the adjudicator in evaluating
16 opinions of other medical sources, e.g., the nature and extent of
17 the treatment relationship; whether the evidence is consistent with
18 other evidence; the expertise of the provider and other factors that
19 tend to support or refute the opinion. SSR 06-03p. Here, the
20 record contains records and evaluations from treating mental health
21 professional Harvey Leavitt, MSW, and various therapists and nurses
22 seen during the period at issue.

23 The record shows Plaintiff's treating physician, Dr. Louise
24 Ullom, consistently noted Plaintiff's anxiety and depression
25 symptoms and referred her to Mr. Leavitt for mental health
26 treatment. (Tr. 263-64.) Mr. Leavitt counseled Plaintiff over the
27 years as part of comprehensive treatment at Farm Workers Clinic and
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1 ultimately referred Plaintiff to Central Washington Comprehensive
2 Mental Health (CWCMH). (Tr. 264, 323, 516-21, 572-79.) In his
3 reports, Mr. Leavitt rated areas of Plaintiff's social functioning
4 as markedly and severely limited. (Tr. 355, 363, 382, 392.) He also
5 found, consistent with Drs. Veraldi and Bailey, that Plaintiff had
6 several moderate limitations in cognitive and social functioning.
7 (See Tr. 355-76.) CWCMH therapists Suzanne Rodriguez, MSW, MHP, and
8 Dick Moen, MSW, also noted numerous moderate, marked, and severe
9 limitations in Plaintiff's cognitive and social functioning in 2008
10 and 2009 evaluations. (Tr. 517-18, 575.)

11 The ALJ gave the "marked" and "severe" ratings noted by Mr.
12 Leavitt and other mental health providers no weight because they
13 "appeared to have been completed largely based on the claimant's
14 subjective reports." (Tr. 19.) Significantly, she did not reject
15 moderate limitations assessed.

16 The blanket rejection of all marked and severe limitations
17 assessed by Plaintiff's therapists is not sufficiently specific or
18 reasoned to satisfy the Commissioner's directives under SSR 06-03p
19 or case law. See *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th Cir.
20 2012) (germane reasons as to each other medical source required);
21 *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (opinions regarding
22 impairment's effect on ability to work may be rejected only with
23 specific, germane reasons); *Nguyen v. Chater*, 100 F.3d 1462, 1467
24 (9th Cir. 1996). Because the record shows Mr. Leavitt had an ongoing
25 treating relationship with Plaintiff, was working with Plaintiff's
26 treating physician, and other medical evidence in the record is
27 consistent with his observations, the ALJ's failure to discuss the

1 SSR 06-03p factors and explain why Mr. Leavitt's opinions were
2 completely rejected is prejudicial error. *Stout v. Commissioner,*
3 *Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006); see also
4 *Molina*, 674 F.3d at 1111 (examples of germane and specific reasons
5 to discount physician assistant's opinions). Further, the ALJ's
6 failure to explain with specificity the weight given Mr. Leavitt's
7 assessment is legal error that taints the ALJ's RFC determination
8 and step five findings. 20 C.F.R. §§ 404.1527(e)(2)(ii),
9 416.927(e)(2)(ii).

10 **C. RFC Determination and Step Five Findings**

11 At step four, the ALJ makes findings regarding a claimant's
12 ability to perform basic work. The RFC findings are administrative
13 findings that may direct a determination of disability. 20 C.F.R.
14 §§ 404.1546, 416.946; SSR 96-5p. Although acceptable medical source
15 opinions are important in the RFC assessment, they are not the only
16 consideration. The ALJ must consider the entire record and include
17 all limitations supported by substantial evidence and a claimant's
18 credible testimony. See *McLeod v. Astrue*, 640 F.3d 881, 885 (9th
19 Cir. 2011)(medical opinions alone do not reflect expertise of
20 vocational expert required in disability determination).

21 At step five, the burden of proof shifts to the Commissioner to
22 show there are jobs in the national economy that Plaintiff can still
23 perform with her RFC. *Kail*, 722 F.2d at 1498. The ALJ may rely on
24 vocational expert testimony if the hypothetical presented to the
25 expert includes all functional limitations supported by the record
26 and found credible by the ALJ. *Bayliss*, 427 F.3d at 1217. Unless
27 the hypothetical is complete, VE testimony is not considered
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1 substantial evidence. For this reason, failure to include all
2 limitations supported by the record in the RFC findings is cause for
3 reversal. *Id.*; *Embrey v. Bowen*, 849 F.2d 418, 422-23 (9th Cir.
4 1988); *SSR* 96-5p.

5 Here, the ALJ found Plaintiff was restricted to jobs with
6 superficial contact with coworkers and only occasional changes in
7 the work setting. (Tr. 16.) As discussed above, the ALJ did not
8 reject mental limitations assessed by Drs. Toews, Veraldi, Bailey,
9 and Mr. Leavitt. Because the ALJ failed to include restrictions to
10 accommodate the unrejected moderate limitations in her RFC
11 determination, the RFC findings at step four are not supported by
12 substantial evidence. Further, at step five, the hypothetical
13 propounded to the VE did not include all unrejected mental
14 limitations; therefore, the VE's opinions that there are jobs
15 Plaintiff can still perform is not substantial evidence upon which
16 the ALJ can rely. Significantly, when presented with a hypothetical
17 individual with the unrejected limitations identified by Dr.
18 Veraldi, the VE testified that with those limitations in
19 combination, an individual would not be capable of sustaining work.
20 (Tr. 73.)

21 In addition, the ALJ failed to explain what evidence supports
22 her definition of the "low stress environment" recommended by Dr.
23 Toews as one with "only occasional changes in the work setting."
24 (Tr. 68-69.) Although it is the ALJ's responsibility to resolve
25 ambiguities in the evidence, *Andrews*, 53 F.3d at 1039, *de novo*
26 review reveals no evidence to reasonably support this narrow
27 definition of "low stress."

1 Substantial evidence does not support the ALJ's final RFC
2 findings or VE testimony relied upon by the ALJ at step five.
3 Because the Commissioner failed to meet his burden at step five,
4 reversal and remand for additional proceedings are required,
5 including further development of the record with a new psychological
6 evaluation to include a review of the records and objective
7 psychological testing. If necessary, a new hearing will be held and
8 new decision rendered in which the ALJ shall re-evaluate medical and
9 other source opinions. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**ECF No. 20**) is
12 **GRANTED** and the matter is remanded to the Commissioner for
13 additional proceedings pursuant to 42 U.S.C. § 405(g) and as
14 directed above.

15 2. Defendant's Motion for Summary Judgment (**ECF No. 30**) is
16 **DENIED**.

17 3. Application for attorney fees may be filed by separate
18 motion.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Plaintiff, and the file shall be **CLOSED**.

22 DATED September 18, 2012.

23
24 S/ JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE